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STATUS OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS

Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

Report of the Secretary-General

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Introduction

1. In its decision 1997/104 of 3 April 1997, entitled "Status of the International Covenants on Human Rights" the Commission on Human Rights requested the Secretary-General to transmit the text of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, contained in document E/CN.4/1997/105, to Governments and intergovernmental and non-governmental organizations for their comments for submission to the Commission on Human Rights at its fifty-fourth session.

2. Pursuant to this request, the Secretary-General, on 27 August 1997, addressed requests for comments to Governments and competent intergovernmental and non-governmental organizations.

3. By 1 January 1998, comments had been received from the following States: Cyprus, Ecuador, Finland, Germany and the Syrian Arab Republic.

4. Replies were also received from the Office of the Legal Counsel of the United Nations, the United Nations Crime Prevention and Criminal Justice Division, the United Nations Department of Political Affairs, the United Nations Department of Humanitarian Affairs and the United Nations University.

5. The Council of Europe and the Organization for Economic Cooperation and Development also submitted their comments.

6. The following non-governmental organizations replied: American Association of Jurists, International Commission of Jurists (Dutch Section), International Commission of Jurists, International Organization for the Development of Freedom of Education, International Human Rights Association of American Minorities, Netherlands Organization for International Development Cooperation, World Federation of United Nations Associations.

7. The present report contains a summary of the substantive replies received.

8. Any additional replies will be reproduced in an addendum to this document.

I. COMMENTS RECEIVED FROM STATES

Cyprus

[Original: English]
[28 November 1997]

The Government of the Republic of Cyprus, in its desire to further strengthen the enjoyment of economic, social and cultural rights, is in full support of the elaboration of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights granting the right to individuals or groups to submit communications concerning non-compliance with the Covenant, as recommended by the World Conference on Human Rights.

Ecuador

[Original: Spanish]
[29 October/6 November 1997]

1. The draft optional protocol is an instrument which the States that signed and ratified it are not obliged to adopt. It contains rules of an eminently adjective or procedural nature, designed to enable the rights established in the International Covenant on Economic, Social and Cultural Rights to be exercised. In the case of Ecuador, the Covenant was ratified on 24 January 1969 and thus became, from that date, a law of the Republic.

2. The Ecuadorian State endorses the report on the protocol submitted by the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights (E/CN.4/1997/105).

3. It also endorses the views expressed by the Committee with regard to its competence "to receive and examine communications from any individuals or groups" when there is a violation of the rights set forth in the Covenant, in accordance with the proposed text of article 1 of the draft.

4. As regards article 2, paragraph 1, of the draft protocol, Ecuador recommends that in accordance with the Committee's view, there should be added, after the phrase "or any individual or group acting on behalf of such claimant(s), may submit a written communication to the Committee for examination", the phrase "provided that they are acting with the knowledge and agreement of the alleged victim(s)". Apart from that, Ecuador is in favour of the text proposed for this article.

5. Article 3, paragraph 2 (a), of the draft should read: "Contains allegations which, if substantiated, would not constitute a violation of rights recognized in the Covenant".

6. The draft protocol should include a recommendation to States parties to take specific measures to enable the rights protected to be enjoyed. The protocol only provides for action in cases where those rights are violated.

7. Recommendations should be made to States parties that they should take specific action to ensure observance and protection of the economic, social and cultural rights of groups such as ethnic communities, women and children who are exposed to the greatest discrimination. These recommendations should be included in the report that each State has to submit to the Committee in accordance with article 17 of the Covenant.

8. Specific recommendations should be made to States parties with regard to systematic violations of the rights recognized in the Covenant, which would constitute a significant advance in the protection of their effectiveness.

9. Ecuador is in favour of the text proposed for the other articles of the draft and with the views put forward by the Committee regarding its wording.

10. Generally speaking, the formal structure of the draft protocol makes it plain that it was essential to draw up this text because the international

community needed a further instrument to facilitate the exercise of the rules set forth in the Covenant. Ecuador recommends that the term "optional" should be deleted in order to make it possible for States parties to the Covenant to be obliged to accede to the adjective instrument. In that way, both instruments would become more effective and the application of their substantive provisions would be easy to ensure.

11. Finally, the Ecuadorian State considers that the draft protocol does not infringe Ecuador's sovereignty, and also that it permits full implementation of the principles contained in the International Covenant on Economic, Social and Cultural Rights, which, having been ratified by the country, constitutes an integral part of its legislation on these matters.

Finland

[Original: English]
[25 November 1997]

1. The Government of Finland welcomes the report of the Committee on Economic, Social and Cultural Rights on a draft optional protocol providing a system of communications in relation to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/1997/105). Finland supports the elaboration of an optional protocol according to which the Committee on Economic, Social and Cultural Rights would be authorized to receive and examine communications from any individual or group of individuals claiming to be a victim of a violation by the State party of a right recognized in the Covenant.

2. The Government of Finland recalls that the Vienna Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights stated that the World Conference encouraged the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocol(s) to the International Covenant on Economic, Social and Cultural Rights. The World Conference on Human Rights also called for the introduction of the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The drafting of such an optional protocol has already begun in an open-ended working group established by the Commission on the Status of Women.

3. The optional protocol providing a system of individual communications enhances the legal protection of the rights of individuals. The proposed optional protocol would also be a step forward to strengthen the implementation of economic, social and cultural rights. It would be a means to ensure that the rights guaranteed in the Covenant are fully recognized and implemented in national practice and legislation.

4. The proposed communication procedure would be parallel to the overall reform of the fundamental rights guaranteed in the Finnish Constitution Act which entered into force on 1 August 1995. The new constitutional provisions in Finland extended legal protection beyond traditional civil and political rights to economic, social and cultural rights, which are directly applicable in courts of justice and before other authorities.

5. The Government of Finland considers that the report of the Committee on Economic, Social and Cultural Rights forms a good basis for future work. However, the draft optional protocol includes elements that will require careful further consideration.

Germany

[Original: German]
[30 October 1997]

1. The Federal Government of Germany attaches great significance to improving the implementation of economic, social and cultural rights, and it is prepared to commit itself to new and promising approaches, in the conviction that all human rights are of equal status and are interdependent. It expressly welcomes the fact that articles 16 ff. of the International Covenant on Economic, Social and Cultural Rights envisage a general mechanism for evaluating the national implementation of the rights enshrined in the Covenant based on national reports.

2. However, the Federal Government has doubts as to whether a complaints procedure as proposed in the draft optional protocol would help to better implement economic, social and cultural rights.

3. These doubts are based on the following considerations:

(a) Under article 2 (1) of the draft optional protocol, the complaints procedure should apply to all rights established in the Covenant. The Covenant, however, contains a number of rights whose implementation depends upon the economic, social and cultural framework created by individual countries' general policies, as well as upon external conditions, which often cannot be enforced under national law;

(b) The frequent lack of justiciability threatens to render ineffective the complaints procedure laid down in the draft optional protocol which is only to be admissible after national legal remedies have been exhausted. This situation might lead to the complaints procedure losing credibility;

(c) According to the draft optional protocol, in addition to victims of a violation of the rights, individuals and groups pleading on behalf of a victim may be entitled to make a complaint. In this way the Committee on Economic, Social and Cultural Rights might be forced to go into a detailed examination of a country's economic, social and cultural policy on the grounds of a complaint, regardless of whether individual rights were violated. This would collide with the examination procedure laid down in articles 16 ff. of the Covenant. Such collisions would not be in line with the aim of the complaints procedure, i.e. to help the individual to better enjoy his rights.

4. The Federal Government would welcome due consideration being given to these reservations during the ongoing consultation process.

Syrian Arab Republic

[Original: Arabic]
[19 November 1997]

1. Replace paragraph (a) of the Preamble with the following two paragraphs:

"Emphasizing that all peoples have the right to self-determination, which implies their right to determine their political status and to pursue their economic, social and cultural development without external interference and without external hindrance,".

"Emphasizing that all States have the right to development and the right to social justice in order to construct a just and equitable national and international order free from fear and poverty,".

2. Replace paragraph (e) of the Preamble with the following paragraph:

"Noting that the possibility for the subjects of economic, social and cultural rights to submit communications concerning alleged failure to secure the observance of those rights, after the exhaustion of local and national methods of recourse, constitutes another means of recourse to guarantee the full enjoyment of the rights".

3. Replace paragraph (f) of the Preamble with the following paragraph:

"Considering that, in order to achieve the purposes of the Covenant and the implementation of its provisions, it is appropriate to enable the Committee to receive and examine, in accordance with the provisions of this Protocol, communications alleging failure to secure the observance of the Covenant".

4. Replace article 1 with the following article:

"Every State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and examine substantiated and relevant communications from any individuals or groups subject to its jurisdiction in accordance with the provisions of this Protocol after local and national methods of recourse have been exhausted".

5. Article 3

Add to paragraph 2 a new subparagraph with the following wording: "is unsubstantiated, irrelevant or politically motivated".

6. Replace article 5 with the following text:

"If at any time after the receipt of a communication, and before a determination on the merits has been reached, a preliminary study gives rise to a definite apprehension that the allegations could lead to irreparable harm, the Committee may request the State to provide

information in order to ascertain the truth of the allegation or may consult with the State Party concerned on the possibility of taking such interim measures as may be necessary to avoid such irreparable harm".

7. Article 6

Delete paragraph 3, since the Committee will act as arbitrator and judge between the State and any complainant.

Replace paragraph 4 with the following text: "The Committee shall prepare a report containing a statement of the facts after submitting it to the State Party".

II. COMMENTS SUBMITTED BY UNITED NATIONS ORGANS AND INTERGOVERNMENTAL ORGANIZATIONS

Office of the Legal Counsel of the United Nations

[Original: English]
[6 October 1997]

1. The draft optional protocol, as the commentary explains, builds on the precedent of the first Optional Protocol to the International Covenant on Civil and Political Rights, as well as on the practice of the Human Rights Committee and other similar organs, both within and outside the United Nations system. In this connection, we appreciate the developments and innovations incorporated in the draft optional protocol, such as the empowerment of individuals or groups to submit communications (article 1); the express recognition of the authority of the Committee to propose provisional measures (article 5), to seek additional information on its own initiative (article 7, paragraph 1), and to visit the State against which the complaint was made (article 7, paragraph 3); as well as its authority to make specific recommendations for remedial measures (article 8) and to follow up on their implementation (article 9). If these and other similar provisions prove acceptable to a majority of States parties, it would be a major step forward in ensuring the respect of categories of human rights as to whose "justiciability" doubts have been expressed.

2. As to the text of the draft optional protocol, we wish to offer a few comments:

(a) We note that, in article 3 (3), the exhaustion of domestic remedies and the examination of the same facts by another procedure of international investigation or settlement are causes of inadmissibility of the communication. However, whereas article 5 (3) (b) of the first Optional Protocol provided an exception in case the application of domestic remedies is unreasonably prolonged, the draft optional protocol introduces this exception only for the procedure of international investigation or settlement. We would suggest to reintroduce it also for the exhaustion of local remedies, which also can be unreasonably prolonged to the detriment of the rights protected by the Covenant;

(b) In article 11, the Secretary-General is requested to provide the Committee "with the necessary staff, facilities and finances for the performance of its functions under this Protocol ...." The request for the Secretary-General to provide staff and facilities can be found in other human rights treaties, and we have no objection to it. However, the reference to the provision of "finances" should be deleted, as it is not under the authority of the Secretary-General to provide financial resources to an organ of the United Nations, and because the Committee on Economic, Social and Cultural Rights is a subsidiary organ of the Economic and Social Council and its expenses are covered by the regular budget of the United Nations. It is thus the General Assembly which will have to consider allocating additional resources for the work of the Committee. Consequently, the words "and finances" in article 11, paragraph 2, should be deleted, and the passage in question should read "... with the necessary staff and facilities";

(c) We also note that the final sentence of article 10 requests the Secretary-General to ensure "that expert legal advice is available to the Committee". It is not clear to us what is meant by that expression: if it refers to advice by the Office of Legal Affairs, the expression is unnecessary, as it is the function of this Office to provide legal advice to United Nations organs, within its competence. If it refers to provision of advice by outside experts, this has to be obtained through the relevant procedures and taking into account existing financial constraints. In any case, the expression might have to be clarified.

3. Finally, on a cautionary note, we wish to draw your attention to the report of 27 March 1997 by an independent expert on the functioning of bodies established pursuant to United Nations human rights instruments (E/CN.4/1997/74). You have requested our views on that report, which we will submit separately. The report in question presents a rather sombre picture of the effectiveness of the existing bodies in view, inter alia, of their heavy workload and their lack of resources. The benefits of adding a new and major function to one of these bodies should also be assessed in the light of the potentially considerable increase in its workload and the unlikely prospect of a proportional increase in the financial resources available to it.

Council of Europe, Directorate of Human Rights

[Original: English]
[3 November 1997]

1. The Council of Europe strongly supports the work that is being carried out within the United Nations to elaborate an optional protocol to the International Covenant on Economic, Social and Cultural Rights, which is entirely in line with our objective of enhancing the principle of the indivisibility, interdependence and interrelatedness of all human rights.

2. The Additional Protocol to the European Social Charter providing for a system of collective complaints of 1995 (the Collective Complaints Protocol), has now been ratified by two Contracting Parties to the Charter. The three additional ratifications that are required in order that it may enter into force are expected to follow shortly and it is likely that the Protocol will enter into force early next year.

3. We would like to underline that the main objective of the Collective Complaints Protocol is to increase the efficiency of the supervisory machinery which is based solely on national reports. This is to be achieved in particular through the increased participation of management and labour and of non-governmental organizations.

4. Under the Collective Complaints Protocol only certain organizations have the right to lodge complaints. There are some differences between the draft optional protocol to the Covenant and the Collective Complaints Protocol, which are due to the basic difference between a system of individual complaints and one of collective complaints. I would like to highlight a couple of these for your reflection.

5. It appears from the Explanatory Report to the Collective Complaints Protocol that because of their "collective nature" complaints may only raise questions concerning non-compliance with a State's law or practice with one of the provisions of the Charter and that individual situations may not be submitted. This collective nature of the complaints is the reason why there is no requirement to exhaust domestic remedies under the Protocol, nor any requirement that the organization lodging a complaint is a victim. It would seem to be clear, however, that the situation of individuals can be used by an organization to substantiate its complaint.

6. The draft optional protocol provides that domestic remedies have to be exhausted. Would this always be necessary considering the general nature of some of the rights contained in the Covenant and the fact that it is proposed to allow individuals or groups acting on behalf of an alleged victim to submit a communication (article 2, paragraph 1)?

7. The Explanatory Report to the Collective Complaints Protocol states that a complaint may be declared admissible even if a similar case has been submitted to another national or international body (compare with article 3, paragraph 3 (b) of the draft optional protocol) and that the fact that the substance of the complaint has been examined as part of the government reports procedure does not in itself constitute an impediment to the complaint's admissibility.

8. It appears that a complaint submitted under the Collective Complaints Procedure would not hinder a complaint concerning the same issues of fact and law to be submitted by or on behalf of an individual victim under the optional protocol.

9. Another important feature of the Collective Complaints Protocol is that the procedure will be shorter than that for examining reports as the Governmental Committee, which is the organ that in the reporting procedure selects those situations criticized by the Committee of Independent Experts that on the basis of social, economic and other policy considerations should be the subject of recommendations by the Committee of Ministers, does not take part in it. This is a point on which management and labour insisted very strongly during the negotiation of the Protocol. The wording of several of the provisions of the Protocol also indicates that the procedure is conceived

to be speedy. The Committee of Independent Experts, which has started the work to elaborate new rules of procedure for the collective complaints, has taken this into account.

10. If your objective is also a speedy procedure, fixing a general time limit of six months for a State party concerned to respond to a communication (article 6 of the draft) would appear to be counterproductive. Time limits can be laid down by the Committee (or its Chairman) on a case-by-case basis.

11. Finally, we would like to stress that whereas States may choose which provisions to accept when ratifying the Social Charter, with certain requirements as to the minimum number, upon ratification of the Collective Complaints Protocol they have to accept collective complaints with respect to all the rights accepted. In order to respect the principle that all rights are equally important, it would seem clearly preferable to adopt the solution proposed by the majority of the Committee to allow complaints in respect of any of the economic, social or cultural rights contained in the Covenant.

III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

American Association of Jurists

(The following NGOs have associated themselves with the comments of the American Association of Jurists: Centre Europe-Tiers Monde, International League for the Rights and Liberation of Peoples, Service, Peace and Justice in Latin America, Women's International League for Peace and Freedom.)

[Original: Spanish]
[30 September 1997]

1. The American Association of Jurists has assiduously participated in the debates of the Committee on Economic, Social and Cultural Rights concerning the elaboration of a draft optional protocol. It has made several oral statements and has submitted a number of documents.

2. The AAJ wishes to provide the Commission on Human Rights with its comments on the draft optional protocol. The comments concern certain fundamental aspects that the text of the draft omitted or covered insufficiently or that would be an improvement to some parts. The comments are based on previous documents of the AAJ, on the views expressed by other NGOs and on opinions and suggestions formulated by experts attending the seminar organized by the AAJ and the Centre Europe-Tiers Monde and held at the United Nations Office in Geneva (14-15 November 1996).

A. The capacity of the States to submit communications

3. In paragraph 14 of the document, the Committee reports that it has decided not to recommend the inclusion of an inter-State complaints procedure within the proposed optional protocol.

4. Excluding this procedure without valid reasons is counter to the approach taken in the International Covenant on Civil and Political Rights (articles 14 et seq.), the Convention on the Elimination of All Forms of

Racial Discrimination (articles 11 et seq.) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 21). The argument that such a procedure is little used, especially by the ILO, is not altogether convincing, because States regularly participate under the ILO procedure of the Committee on the Application of Standards (one of the Committees of the ILO Conference), in the analysis of reports of other States and in the drafting of recommendations regarding States which do not comply with the rules in force, which explains that other procedures provided for in the ILO Constitution are exceptionally used.

5. Here, the AAJ's main concern is that excluding States as active subjects from an instrument of international law makes legal nonsense, because States are, by definition, inevitable subjects of international law.

6. In view of the specific nature of the rights contained in the case of the International Covenant on Economic, Social and Cultural Rights, the capacity of States to submit communications should extend not only to complaints of violations committed in another State, but also to violations committed in their own territory by another State or by an international or transnational enterprise whose headquarters are in another State.

7. Therefore, a provision should be included in the draft concerning communications submitted by the State, in line with the relevant provisions of the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture, with an extension of the capacity of States, as suggested.

B. The requirement that the complainant must be subject to the jurisdiction of the State against which the complaint was brought (article 1 of the draft)

8. Article 1 admits communications only from individuals or groups subject to the jurisdiction of the State against which the complaint was brought. Surprisingly, in document E/CN.4/1997/105, no justification is provided for this restrictive provision. The issue was discussed by the Committee and the AAJ, for its part, made several statements which provided solid reasons to eliminate such restriction.

9. The Chairman of the Committee, who was in favour of a restrictive provision, supported his position as follows. He confirmed that article 1, paragraph 1, was based on the Optional Protocol to the International Covenant on Civil and Political Rights. But the words "subject to its jurisdiction" were used deliberately, because, in the absence of a restrictive clause of that type, there could be a situation where a State lodged a complaint against an action committed by another State. A State might, for example, consider that another State's "imperialism" violated the economic and social rights of its own population. It therefore seemed necessary to introduce a restriction, without thereby limiting the exercise of the rights that the Covenant recognized for nationals of States parties.

10. The AAJ holds that such restriction is anachronistic, in view of recent legal developments. Nowadays, international law doctrine and jurisprudence acknowledge that individuals are subjects of international law. Therefore, it

is a general principle that individuals should be admitted, under the conditions established by law, to bring their complaints before relevant international bodies if their rights are violated by any State, legal entity or individual, and not only by the State with jurisdiction over the complainant.

11. Regional human rights instruments have integrated this principle within their texts. None of those instruments contains the requirement that the petitioner must be under the jurisdiction of the State party denounced.

12. Article 2 of the ICESCR is different from article 2 of the International Covenant on Civil and Political Rights, because the rights protected by each one are different. In fact, article 2 of the ICCPR restricts the obligation of States to respect and guarantee civil and political rights "to all individuals within its territory and subject to its jurisdiction". Article 2 of the ICESCR does not contain such restriction and otherwise states that each State party ... "undertakes to take steps, individually and through international assistance and cooperation ..." (emphasis added)

13. The text of article 1 of the draft optional protocol is literally the same as article 1 of the first Optional Protocol to the ICCPR. The latter derives from article 2 of the ICCPR. In the first Optional Protocol, the reference to the territory was omitted, so a State party recognizes the competence of the Committee to "receive and consider communications from individuals subject to its jurisdiction" without further clarification concerning the kind of jurisdiction (territorial, personal or both).

14. The text of article 1 of the first Optional Protocol to the ICCPR has caused considerable implementation problems for the Human Rights Committee precisely because it restricts the right to allege the commission of violations by a State to "individuals subject to the jurisdiction" of that State. In the exercise of its quasi-jurisdictional functions, the Committee has found that a literal application of article 2 of the Covenant and article 1 of the Optional Protocol would remove protection from certain individuals turning to the Committee to complain of serious civil and political rights violations. That was the case, for instance, with Uruguayan citizens abducted by members of the Uruguayan armed forces in Argentina and Brazil and secretly moved to Uruguay during the 1970s. The State denounced by the victims was Uruguay, yet the violations had been committed outside Uruguayan jurisdiction. The Human Rights Committee has rightly pointed out that it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

15. To arrive at that conclusion, the Committee referred to the paragraph in article 1 of the Protocol, disregarding the text of article 2 of the Covenant and stating that the Committee could receive and consider communications from individuals subject to the jurisdiction of the State concerned, thus interpreting jurisdiction as being personal and not territorial. The Committee also based its resolution on article 5, paragraph 1, which prescribes "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any

act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". This provision contains a rule for the interpretation of the Covenant.

16. In the Uruguayan case, one of the victims had dual nationality: Italian by blood and Uruguayan by birth. She had been abducted in Brazil by members of the Uruguayan armed forces. Had this person been only Italian, could she have been deprived of protection on the grounds that personal jurisdiction could not be invoked? Surely not, according to the general principle contained in article 5 of the Covenant.

17. A member of the Human Rights Committee submitted an individual opinion concerning the above-mentioned decisions. He said that in principle, the scope of application of the Covenant was not susceptible to being extended by reference to article 5, a provision designed to cover instances where formal rules under the Covenant seemed to legitimize actions which substantially ran counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses to such an extent that the very substance of those rights and freedoms would be annihilated and individuals are legally barred from availing themselves of the same rights and freedoms with a view to overthrowing the regime of the rule of law which constitutes the basic philosophy of the Covenant. In relation to article 1 of the Protocol, the same member narrowed the interpretation of that article by the Committee. In his view, the words "within its territory" could not be interpreted as granting State parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.

18. The AAJ disagrees with that member's interpretation of article 5 of the Covenant and article 1 of the first Optional Protocol. In effect, article 5, paragraph 1, of the Covenant contains two different and well-defined provisions linked by the word "or". The first provision prohibits any State, group or person to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant. The second provision prohibits limiting those rights and freedoms to a greater extent than is provided for in the Covenant, for example through abusively restrictive regulations. Notwithstanding the opinion of the above-mentioned member, States are not only barred from using abusive limitation clauses: a general prohibition concerning violation of rights and freedoms protected by the Covenant is contained in this provision. Thus, article 5, paragraph 1, of the ICCPR is a basic rule of interpretation for the Covenant and the Committee has rightly referred to it in both decisions.

19. In the same individual opinion, the member of the Committee stated that article 1 of the first Optional Protocol should be interpreted as prohibiting States from violating the human rights of their nationals outside national territory. That reasoning could lead to the absurd conclusion that the Covenant does not prohibit States from violating the human rights of foreigners outside of their territory. The words "subject to its jurisdiction" admits only one interpretation: it establishes the obligation

for the State to guarantee the enjoyment of civil and political rights within its own territorial and personal jurisdiction. It may not be interpreted as establishing limits to the universal obligation of any State to respect such rights.

20. In 1993, the Human Rights Committee referred again to this question in relation to the former Yugoslavia. During the consideration of the report of the Federal Republic of Yugoslavia (Serbia and Montenegro), a member of the Committee said that State parties were responsible for the observance of human rights when their representatives were involved and when their acts affected human beings, even outside their national territory. It should be noted that in the statement the member said "human beings", not "nationals".

21. In 1995, the Human Rights Committee stated, in its comments to the report submitted to it by the Government of the United States of America, that the Committee did not share the opinion expressed by the Government that under no circumstances could the Covenant have an extraterritorial effect. It also stated that such opinion was against the interpretation consistently made by the Committee on that matter, which indicated that in special circumstances, individuals could be subject to the jurisdiction of a State party ratione materiae, even if they were outside the territory of such State.

22. As already noted, the obligation to respect civil and political rights is a universal one and when this obligation is not respected, the international community has a legitimate right to intervene through its relevant organs. How, then, could victims be deprived of the right of recourse to the appropriate bodies because they are not "subjects" of the State committing the violation?

23. On the other hand, the International Covenant on Economic, Social and Cultural Rights, which should serve as the basis for the draft optional protocol, does not make the effects of the rights it enumerates conditional either upon territory or upon jurisdiction. The reason is that economic, social and cultural rights, such as they are enshrined in international instruments, and especially in the Covenant, imply a universal passive obligation to respect them, as is also true of civil and political rights, but their specific nature also creates a universal active obligation to guarantee them.

24. The fundamental international human rights instruments have taken into consideration the specific nature of economic, social and cultural rights. The Universal Declaration of Human Rights mentions international cooperation in relation to economic, social and cultural rights (article 22). The Charter of the United Nations, in its Article 1, paragraph 3, mentions as one of the purposes of the United Nations "To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting respect for human rights and for fundamental freedoms". The International Covenant on Economic, Social and Cultural Rights establishes, in its article 2, that "Each State ... undertakes to take steps, individually and through international assistance and cooperation ...".

25. Presently, globalization of the economy has created an interrelation and an interdependence among all the countries of the globe in such a way that economic and social phenomena in a country or group of countries may have important repercussions on another country or group of countries. This globalization of the economy is focusing increasingly on what is known as "the rights of solidarity" in the context of economic, social and cultural rights, e.g. the universal active obligation to guarantee those rights through international cooperation. It also highlights the responsibility of third parties in violations of those rights, which is implied in their ignoring the universal passive obligation of respect for human rights, for example, the imposition of structural adjustment programmes by international financial institutions or the economic, financial and trade policies of certain States or transnational corporations.

26. That was not to imply any release from responsibility of the State in which those violations took place, but rather to introduce the concept of the joint responsibility of the authorities of the State and of the international organizations and/or other States that contributed by their policies to such violations. The victims, either under the jurisdiction of the State responsible for the violation or not, should be given the right to denounce the facts and the State responsible for an action or an omission violating the human rights of the victim.

27. Therefore, it is suggested to withdraw from the text of article 1 of the draft, the words "subject to its jurisdiction".

B. Who is authorized to submit communications? (article 2 of the draft)

28. Article 2 of the draft optional protocol indicates that "Any individual or group claiming to be a victim of a violation ... or any individual or group acting on behalf of such claimant(s) ..." may submit communications. Thus, NGOs or other groups which are not acting with the knowledge and agreement of the victim(s) will not be allowed to initiate proceedings.

29. The reasons provided to justify this limitation in document E/CN.4/1997/105 are not serious. They rather aim at instilling in the reader of the report apprehension vis-à-vis the catastrophic consequences anticipated by the author in the case that NGOs are authorized to submit communications.

30. In fact, authorizing NGOs to submit communications does not open the door to "complaints which sought to anticipate violations" or to "speculative complaints", as claimed in the report of the Committee (paragraph 22). The consideration of such communications is prevented by the requirements for admission and the procedure of admissibility of the communications. If NGOs were given access to the procedure, it would not imply "to eliminate all requirements such as 'consultative status', links to the country concerned, or special knowledge or particular competence in relation to the issues raised" (ibid.). On the contrary, all such requirements exist in other international instruments and should also exist in this optional protocol. The report displays arguments against a proposal that was never supported by NGOs, so that it can easily take the opposite approach as a more convenient alternative. The same happens with the assertion in the report that to open

the procedure to complaints from NGOs would "come at the price of opening up the procedure to a vast number of complaints which do not have to satisfy any minimum requirement ...", since the procedure has requirements for admission that will stop any "ill-informed or gratuitous complaint" (ibid).

31. The capacity of NGOs to submit communications or complaints is incorporated into several international instruments: in article 44 of the American Convention on Human Rights, which is referred to in paragraph 6 of article 19 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"); in the African Charter on Human and Peoples' Rights (article 56); in the procedures of the International Labour Organization (Committee of Experts on the Application of Conventions and Recommendations, Committee on Freedom of Association, etc.), within which national trade unions can submit complaints concerning situations in their respective countries, and the international organizations can do so with respect to any country; in the rules for the submission of communications to UNESCO; in the Additional Protocol to the European Social Charter, which provides for a system of collective complaints adopted by the Committee of Ministers on 22 June 1995 and opened for signature on 3 November 1995. This Protocol authorizes complaints alleging unsatisfactory application of the Charter from: (a) international organizations of employers and trade unions; (b) other international NGOs with consultative status; (c) representative national organizations of employers and workers in the impugned State; (d) other NGOs which the State has recognized as having that right (articles 1 and 2 of the Protocol).

32. There is a tendency, even in United Nations treaty bodies, to concede a more active role to non-governmental organizations.

33. It is often the case that victims of violations of human rights are among the most vulnerable groups of the population which frequently do not have access to the information on international procedures and have no way to report before international bodies. Especially in such cases, the exercise of the actio popularis by NGOs, e.g. the right to submit communications even without a specific mandate, is essential.

34. Excluding NGOs from the parties with a capacity to submit complaints under the optional protocol to the ICESCR would be a retrograde step given the current dominant international trend and would ignore the fact that fundamental human rights are peremptory rules (jus cogens) and universally applicable (erga omnes).

35. Therefore, it is suggested to amend article 2, paragraph 1, of the draft optional protocol as follows: replace the words "the State party concerned" by "a State party" and add at the end of the sentence, a new sentence reading "Non-governmental organizations legally recognized in one or more States as well as those with consultative status with the United Nations will be also allowed to submit written communications".

D. Non-fulfilment of the reporting obligations

36. The AAJ disagrees with the approach taken by the Committee to exclude from the optional protocol the reporting obligation contained in part IV of the Covenant (see E/CN.4/1997/105, para. 24). In AAJ's opinion, the non-fulfilment of the reporting obligation should be the object of a special procedure involving the examination of the situation and an analysis of the consequences of such omission for the human rights of a population or for sections or groups of such population. In addition, the existing practice of the committees of several international instruments to consider the situation in a country even in the absence of a report from the Government should be included as a provision in the optional protocol, together with the procedure to be followed in such cases.

E. Article 3 of the draft: exhaustion of domestic remedies and proceedings under another procedure of international investigation or settlement

37. The AAJ suggests the following amendment to paragraph 3 (a) of article 3 (ibid., para. 33): at the end of the sentence, add "This shall not be the rule where the application of the remedies is unreasonably prolonged (see article 5, paragraph 2 (b), of the first Optional Protocol to the ICCPR), where the victim(s) cannot have access to them, and where the remedies are inefficient.

38. In relation to paragraph 3 (b) of article 3, the AAJ suggests the following amendment: delete the words "by or on behalf of the alleged victim" and add "of a similar nature" after "procedure of international investigation or settlement". This is suggested because certain international procedures of a different nature, such as a number of humanitarian procedures, do not prevent a communication from being admitted.

F. The obligation to redress and compensate for damage (article 8 of the draft)

39. Article 8 needs more precise language. While the word "remedy" in English may involve compensation, that is not the case in French and Spanish. AAJ suggests that the text of article 8 (ibid., para. 49) be amended as follows: "... the State party take specific measures to stop the violation of human rights, to compensate the victim(s) for damage and to prevent its recurrence".

G. Binding nature of the protocol (article 14 of the draft)

40. The optional protocol is a binding instrument not only for the States parties within their own territory (pacta sunt servanda), but also in relation to the international community, according to international law in force at present (Universal Declaration of Human Rights, the two Covenants and other international instruments considered as jus cogens).

41. Therefore, AAJ suggests to eliminate from the text of article 14 (ibid., para. 58) the words "in respect of all territories subject to its jurisdiction".

International Commission of Jurists (Dutch Section)

[Original: English]
[8 December 1997]

A. Arguments supporting the adoption of an optional protocol to the ICESCR

1. The Dutch Section of the International Commission of Jurists (NJCM) is a proponent of the adoption of such a complaints procedure in the form of an optional protocol to the ICESCR. The main arguments for this point of view, which have also been formulated by the Committee on Economic, Social and Cultural Rights during the 1993 Vienna World Conference on Human Rights, are the following.

2. First, in the light of the principle of interdependence and indivisibility of all human rights, the blatant inequality between the supervisory mechanisms of the sibling Covenant has become an untenable discrepancy. The adoption of an optional protocol would be an important contribution to stop merely paying lip-service to this fundamental tenet in the United Nations human rights system.

3. Secondly, the complaints procedure would enable the Committee to further clarify and elaborate upon the scope and meaning of the substantial provisions in the Covenant. Working on the reduction of the alleged vagueness and lack of clarity of economic, social and cultural rights, a justification often used to refute the feasibility of a complaints procedure, would be possible by means of such a procedure.

4. Thirdly, the possibility of bringing individual and concrete cases concerning economic, social and cultural rights to an entity at the international level would focus more attention on these rights, and, in the words of the Committee, "would give economic and social rights a salience in terms of the political concerns of Governments that those rights very largely lack at present." (A/CONF.157/PC/62/Add.5, annex II, para. 37). This could also stimulate States parties to ensure the availability of adequate and effective domestic remedies in respect of economic, social and cultural rights.

B. General aspects of the draft optional protocol to the ICESCR

1. Status of the Committee in the framework of the optional protocol

5. In the draft optional protocol submitted by the Committee on Economic, Social and Cultural Rights, the Committee is assumed to be the supervisory body of the optional protocol. The NJCM concurs with this assumption. The inclusion of provisions in the optional protocol, which would be relevant in the event that the Committee is abolished by the Economic and Social Council, may not be necessary or appropriate (see E/C.12/1996/CRP.2/Add.1, paras. 34-37). In the opinion of the NJCM, it is logical to make use of the knowledge and expertise the Committee has acquired through its work since its inception in 1985. It is also relevant to note that at the request of the

Economic and Social Council in resolution 1996/38 the Secretary-General submitted a report on the legal procedures necessary to bring the Committee on Economic, Social and Cultural Rights, in line with the other similar human rights treaty bodies (E/1996/101). In addition, it is not recommended to create yet another supervisory body within the United Nations human rights system. As stated in the final report on the effectiveness of the United Nations human rights system (E/CN.4/1997/74, paras. 94-96) the present trend is a move towards a consolidation of the treaty bodies, and even the possible reduction of the number of treaty bodies in the future.

2. The terminology used in the optional protocol

6. The type of language the Committee has chosen to use in the draft optional protocol is the "violations" language, following the formulation used in the first optional protocol to the International Covenant on Civil and Political Rights. The NJCM would like to support the Committee's decision to adhere to the consistent use of the "violations" terminology throughout the entire draft optional protocol. Various alternatives have been presented, inter alia, by the expert meeting organized by SIM, the Study and Information Centre at the University of Utrecht, the Netherlands which adopted a text of a draft optional protocol to the ICESCR 1/ these alternatives include phrases such as "a failure by the State party to give effect to its obligations under the Covenant", (see E/CN.4/1997/105, annex, para. 18) and "a failure to ensure the satisfactory application of a provision" (used in the proposed additional protocol to the European Social Charter). The advantage of such definitions is that they can be easily construed to include obligations which are of a more programmatic nature. The use of these definitions could give rise to objections on the part of States parties, claiming that States parties have a wide discretionary margin as to the realization of so-called "obligations of result", and that this cannot be subjected to the scrutiny of the Committee. Yet, in accordance with the Committee's line of reasoning, referring to the issue in the communication as a "violation" can be interpreted to include a wide range of situations and circumstances described in the communication. The precise determination of a State party's obligation under a specific ICESCR provision is still dependent upon the specific facts and circumstances of each concrete case, and the implications of these facts and circumstances upon the interpretation of the substantive provision and article 2 (1) of the Covenant. Furthermore, the use of the "violation" terminology would be in concordance with the first Optional Protocol to the ICCPR, which is an important argument in the light of the notion that all human rights are equal, an equality which should include their supervision.

3. The persons and/or entities who have the right to submit a communication: standing requirements

7. The issue of standing requirements, or which persons and/or entities are to be given the right of communication, is one which the NJCM particularly wants to focus on. This issue consists of three aspects: the question whether groups themselves can be considered to be victims of violations; the question whether individuals and/or groups should be allowed to submit a complaint; and the question whether third parties are to be given the right to act on behalf of alleged victims.

8. Concerning the first aspect it is important to note that, in practice, the Human Rights Committee has interpreted article 1 of the Optional Protocol to the ICCPR narrowly in the sense that neither groups as a whole, nor legal persons can be considered as victims of a violation themselves, unless the individual members of the group are actual victims of the violation concerned, given the formulation of this article. 2/ The NJCM is in favour of the formulation in article 2 (1) of the draft optional protocol to the ICESCR, which explicitly mentions that groups can be victims themselves. This feature of the complaints procedure might prove to be of great significance in the framework of economic, social and cultural rights, In addition, the NJCM wishes to emphasize that it interprets the term "groups" to also include legal persons; for example, the board of a school can be considered a victim and allowed to submit a complaint concerning article 13 of the ICESCR.

9. As to the second aspect, the NJCM would like to stress the importance of allowing individuals, as well as groups, as complainants to the procedure. From the beginning, the Committee on Economic, Social and Cultural Rights has shown a "strong and clear preference for an individual focus" (E/CN.4/1997/105, annex, para. 19). This would also be consistent with the form of the first Optional Protocol to the ICCPR. The NJCM concurs with the Committee on Economic, Social and Cultural Rights in explicitly granting groups the right of communication, thereby referring to Commission on Human Rights resolution 1994/10 which also mentions the possibility of communications being submitted by individuals on behalf of affected groups and vice versa (ibid., para. 20). Furthermore, the NJCM acknowledges the fact that article 2 (1) of the draft optional protocol to the ICESCR is formulated to potentially include public interest groups and NGOs, which can act on behalf of alleged victims who are unable to do so themselves.

10. With regard to the aspects discussed above, it is recommended by the NJCM that in addition to individuals and groups, organizations be explicitly and separately mentioned as entities with independent locus standi, as well as with the possibility to claim being victims themselves, as this would considerably enhance the access to the complaints procedure. An example of such an entity would be a trade union.

4. The range of rights subjected to the complaints procedure

11. The NJCM agrees with the Committee's recommendation to the Commission on Human Rights that the optional protocol should be applicable to all economic, social and cultural rights in the Covenant, i.e., all rights from articles 1 to 15, which is also referred to as the "comprehensive approach". It has been noted that particularly the right to self-determination in article 1 might pose problems of interpretation by the Committee, yet the Committee rightly observes that there should be no obstacles as to dealing with economic, social and cultural aspects of the right to self-determination (ibid., para. 25). The Committee points out that, similarly, the civil and political dimensions of the right to self-determination (also contained in article 1 of the ICCPR) are the domain of the Human Rights Committee. However, the Human Rights Committee has decided that it is not competent to consider complaints related to article 1 of the ICCPR, since, according to article 1 of the first

Optional Protocol to the ICCPR, only individuals can claim to be victims. Article 1 grants the right of self-determination to people, and can therefore not be considered to fall within the procedure under the first Optional Protocol to the ICCPR. 3/

12. The dangers of a selective approach, allowing the exclusion of some rights from the scope of the proposed complaints procedure, are twofold. The first danger is that a selective approach may open the door to arguments pertaining to possible inequality between the different economic, social and cultural rights, thereby encroaching upon the notion of interdependence and indivisibility of all human rights. The second danger is that States parties to the ICESCR, upon ratification of an optional protocol to the ICESCR, will be able to make a selection of rights which is "unduly narrow".

13. Although a significant group within the Committee showed its preference for this selective approach, permitting States parties to choose a specified range of rights to which the optional protocol applies, the NJCM would like to commend the Committee for ultimately opting for the comprehensive approach, and requests the Commission on Human Rights to follow this recommendation.

C. The provisions of the draft optional protocol to the ICESCR

Article 5

14. The proposed article 5 on interim measures (E/CN.4/1997/105) allows the Committee to request for interim measures to be taken by the State party concerned to avoid irreparable harm, in the event a "preliminary study gives rise to a reasonable apprehension". This latter qualification was not included in the article contained in document E/C.12/1996/CRP.2/Add.1, which was used as the basis of discussion by the Committee during its fifteenth session in November 1996. The formulation in that report was:

> "At any time after the receipt of the communication, and before a determination on the merits has been reached, the Committee may request the State party concerned to take such interim measures as may be necessary to preserve the status quo or to avoid irreparable harm (para. 46).

15. The NJCM would like to point out the fact that such an additional condition may give rise to objections by States parties as to the meaning of "a reasonable apprehension". Therefore, the NJCM recommends maintaining the earlier text of article 5, which implicitly leaves it to the discretion of the Committee to determine the necessity of such interim measures. However, it is important to bear in mind that a sound foundation of the decision is essential to support the request for interim measures.

Article 7

16. The examination procedure of the communication encompasses the following elements: the sources of information which may be used in the examination; the competence of the Committee to adopt the necessary (rules of) procedures:

the possibility of an on-site visit to the territory of the State party concerned; the closed nature of the meetings; and the adoption of views and the transmission thereof, together with any recommendations, to the State party and the author.

17. Some of these elements are similar to those in article 5 of the Optional Protocol to the ICCPR, yet article 7 is more extensive by allowing other sources to submit information regarding the communication, by providing for the on-site visit, by allowing for the adoption of necessary procedures, and by the explicit mention of the fact that the Committee may also transmit recommendations to the State party concerned, which also happens in the practice of the Human Rights Committee.

18. The NJCM particularly supports the possibility of the Committee to make use of other sources of information for the consideration of the communication, rather than just taking into account the information provided by the parties concerned.

Article 8

19. According to this article, if the examination results in the Committee's view that a violation has occurred, the Committee may recommend that specific measures be taken by the State party to remedy the violation, and in order to avoid recurrence. The State party is also expected to inform the Committee of these measures, within a period of six months.

20. This article, which is not found in a formal provision in any of the other United Nations complaints procedures - yet which has been developed in practice - is particularly useful to stimulate and help States parties to comply with their obligations under the Covenant. The second paragraph is aimed at ensuring that the recommendations are seriously taken into account. The following article 9 elaborates on the follow-up procedure in more detail.

21. The NJCM would like to point out that it might be worth considering leaving open the possibility for the Committee to also formulate recommendations in cases where it did not establish a violation in this specific case, but where it would be advisable if the State party concerned would change its policy or amend its legislation.

Article 9

22. The follow-up procedure contained in the draft optional protocol to the ICESCR is especially aimed at maintaining the so-called "constructive dialogue" with the States parties concerned and, as mentioned above with regard to article 8, to ensure that the recommendations of the Committee are actually taken into consideration. One of the main objectives is to prevent the complaints procedure leading to a confrontational situation between the State party concerned and the Committee. Article 9 expressly formulates the rules which have been developed by the practice of the Human Rights Committee. The NJCM does express its doubt as to the necessity of including the clause "a mutually convenient time" in the provision, which might give occasion to undesirable discussions regarding the determination of such a time. The need for such a request should be left to the discretion of the Committee.

D. Concluding remarks

23. In conclusion, the NJCM would like to reiterate the main points made in this commentary:

(a) With regard to the locus standi: The NJCM recommends the extension of entities granted the right of communication, as well as the extension of the entities which can be considered victims of a violation of rights in the ICESCR, both to include organizations and public interest groups;

(b) Concerning the range of rights: The comprehensive approach with regard to the range of rights subject to the complaints procedure is supported by the NJCM, in the light of the interdependence and indivisibility of all human rights;

(c) With respect to the substantive provisions:

(i) The NJCM would like to suggest the omission of the clauses "a reasonable apprehension" in article 5, and "a mutually convenient time" in article 9, as these may give cause to undesirable discussions regarding the interpretation of these terms;

(ii) The NJCM also supports the inclusion of other sources of information during the examination of the communication, as provided for in article 7;

(iii) Finally, it is proposed by the NJCM to include in article 8 the possibility for the Committee to also make recommendations in cases in which a violation has not been established.

24. As a whole, the optional protocol to the ICESCR drafted by the Committee on Economic, Social and Cultural Rights is well structured, clear and comprehensive. The Committee has succeeded in formulating a complaints procedure which is unequivocal in its objectives, as well as in its terminology, yet which allows for a margin of interpretation by the Committee necessary when dealing with concrete individual cases concerning specific countries. The NJCM congratulates the Committee on this achievement and offers its support in further endeavours concerning the issue of an optional protocol to the ICESCR. The NJCM emphasizes its willingness to remain involved in the process of drafting an optional protocol to the ICESCR.

25. Finally, the NJCM expresses the hope that the Commission on Human Rights will maintain its focus on the realization of an individual complaints procedure for economic, social and cultural rights in the near future, thereby complying with the principle of interdependence and indivisibility, as laid down in the Universal Declaration of Human Rights and the two Covenants of 1966, and contributing to the ongoing process of developing the United Nations human rights protection system.

International Commission of Jurists

[Original: English]
[28 October 1997]

1. The call made in Vienna encouraging the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to examine the elaboration of protocols to the International Covenant on Economic, Social and Cultural Rights (ICESCR) remains valid. We recall the long-standing commitment of the ICJ to the indivisibility of human rights - economic, social, cultural, civil and political. That commitment has been evidenced over the years by the Declaration of Delhi (1959), the Law of Lagos (1961), the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), the paper for the World Summit for Social Development (1995), the Bangalore Plan of Action (1995) and the Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights (1996), amongst many other ICJ activities concerned with the promotion and protection of human rights for the attainment of the rule of law.

2. The ICJ supports the elaboration of an optional protocol to the ICESCR, to provide an individual and group complaint procedure similar to the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). This would provide a complaints mechanism to permit international monitoring of complaints of departures from the rights expressed in the ICESCR.

3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of economic, social and cultural rights as is being done for civil and political rights.

4. The draft optional protocol presently under consideration reflects the existing developments with similar treaties adopted within the United Nations and other regional human rights systems. It follows closely the procedure established under the ICCPR with some useful modifications. A comprehensive approach is adopted in regard to the rights to be covered, while innovative measures which will further ensure the protection of the rights under the ICESCR are introduced.

International Organization for the Development of Freedom of Education

[Original: French]
[5 November 1997]

1. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights encourages "the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights" (part II, paragraph 75).

2. This year the Commission had before it a draft optional protocol prepared by the Committee on Economic, Social and Cultural Rights which grants

individuals and groups the right to submit communications concerning non-compliance with the Covenant. The International Organization for the Development of Freedom of Education would like to see this draft protocol adopted as quickly as possible. We consider that it should be a priority, given the lack of balance there is between civil and political rights and economic, social and cultural rights.

3. Being aware of this situation, the Commission on Human Rights has more than once expressed its support for economic, social and cultural rights. In doing so, it is following the Vienna Declaration and Programme of Action, which solemnly recognizes that all human rights are universal, indivisible and interdependent.

4. But declarations of principle are not enough: it is necessary to set up machinery which will enable progress to be made in the recognition of these rights, and the optional protocol is a particularly important instrument. As it says in the preamble, "The possibility for the subjects of economic, social and cultural rights to submit complaints of alleged violations of those right is a necessary means of recourse to guarantee the full enjoyment of the rights".

5. By enabling the Committee to examine complaints from individuals, the optional protocol would facilitate a detailed study of the content of each right. It would make it possible to establish a body of case law, similar to the one developed by the Human Rights Committee, which can only be derived from specific cases. This would lead to a more precise definition of the content of each of the rights in the Covenant and of the obligations of States and the social actors in relation to these rights.

6. Economic, social and cultural rights are often criticized as being vague, and even as not being justiciable. These arguments are often put forward on the international scene to conceal the lack of any real desire for progress. Adoption of the optional protocol would give the international community the means to work for effective recognition of economic, social and cultural rights. It is in fact concerned with this central point: justiciability and the definition of the content of each of these rights. It thus represents a test of the international community's political will to promote these rights.

7. Adoption of the optional protocol would be a powerful signal in favour of economic, social and cultural rights, a sign that the international community wants to take them seriously and put the two types of rights on an equal footing. Any delay in adopting it might be interpreted as conniving at injustice and poverty in a world which urgently needs reform of the international economic order.

8. There are many obstacles in the way of this optional protocol, particularly the distrust with which certain States, whether of the North or the South, regard economic, social and cultural rights. We have seen this during the six years it has taken the Committee on Economic, Social and Cultural Rights to draw up the draft optional protocol. But the most important obstacle is no doubt the lack of political will resulting from a lack of thorough knowledge of the machinery.

9. This type of procedure is nothing new. Complaints procedures in the field of economic, social and cultural rights exist under the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, Economic and Social Council resolution 1503 (XLVIII), the American Convention on Human Rights (Protocol of San Salvador) and the European Social Charter (Additional Protocol of June 1995).

10. We should now like to make some comments on four points in the draft which seem to us to be of particular interest.

Question of who has the right to submit a communication

11. According to the draft, both individuals and groups are entitled to submit complaints, but in principle they should be subject to the jurisdiction of the State and be victims of the violation. The question that has arisen is whether third parties who have a "sufficient interest" (the wording used in the draft protocol of the Committee on the Elimination of Discrimination against Women) and NGOs could also submit complaints. The Committee adopted a similar wording. In our opinion, and it is the opinion of other NGOs, in a global world like ours, it is necessary to allow third parties to submit complaints, particularly when they relate to massive and grave violations of economic, social and cultural rights.

12. Such a step would constitute an additional safeguard which would counteract any pressures that might be brought to bear on individuals or groups who were victims of alleged violations.

Rights included

13. There was a discussion in the Committee on this question. The majority was in favour of an exhaustive approach, considering that all rights had the same status. The draft leaves the question open. We think that it is of the highest importance to keep the global approach: all the rights recognized in articles 1 to 15 of the Covenant. The arguments of the majority in the Committee against the selective approach seemed to us very much to the point:

(a) The approach might be perceived from a practical viewpoint, although not from a theoretical one, to challenge the principle that all rights are equally important;

(b) The approach would differ from the holistic one reflected in the first Optional Protocol to the International Covenant on Civil and Political Rights.

14. It also seems to us essential to safeguard the unity of the Covenant through all the rights recognized in it.

Protection of persons and/or groups alleging violations

15. This is an innovation made necessary by experience of human rights protection mechanisms. In order to ensure the protection of individuals and/or groups alleging violations, the optional protocol provides in article 2 that States "undertake not to hinder in any way the effective exercise of the

right to submit a communication and to take all steps necessary to prevent any persecution or sanctioning of any person or group submitting or seeking to submit a communication ...".

Provisional measures to be taken in the event of irreparable harm

16. This is also an innovation in relation to the first Optional Protocol to the International Covenant on Civil and Political Rights. The draft states that if before a determination on the merits has been reached a preliminary study gives rise to a reasonable apprehension that irreparable harm could result, the Committee may request the State to take measures to avoid such harm. This seems to us particularly important where economic, social and cultural rights are concerned, because States have several types of obligations in relation to these rights. As stated in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights recently adopted on the initiative of the International Commission of Jurists, States have three types of obligations: compliance, protection and full performance.

Notes

1/ For the text of the Utrecht draft optional protocol, see SIM Special No. 18, pp. 233-239.

2/ Article 1 of the Optional Protocol to the ICCPR states that "individuals ... who claim to be victims of a violation" have the right of communication.

3/ See Ominayak v. Canada, Communication No. 167/1984, Official Records of the General Assembly, forty-fifth session, Supplement No. 40 (A/45/40), vol. II, annex IX, sect. A, pp. 1-30.

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